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Reply Brief of Barger & Clarke for

IN THE

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

876

HARTFORD FIRE INSURANCE COMPANY ET AL.,
Plaintiffs in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

On Petition of Plaintiffs in Error for writ of Certiorari to the United States Circuit Court of Appeals, for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

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Can a railroad company make a contract *in presenti* to protect itself against its future wrongful acts, and thus in advance abrogate a future right which the law casts on every person before the right really comes into being? If so, then one may insert in a promissory note an agreement that he will not assert the statute of limitations after the note is barred by that statute.

If one goes on to a railroad's right of way, without its permission, is there no duty on the railroad company not needlessly or intentionally to injure such person?

If such person comes on by permission, is not the railway in duty bound, not by its negligence, slight, great, wilful or wanton to injure such person?

If under an enlightened jurisprudence public policy imposes

the duty on the railway not thus by slight, great, wilful or wanton negligence to injure such person, is not a contract permitting the railway thus to injure him contrary to such duty, and is not the tendency of such a contract contrary to the high degree of care which the law requires of railways in regard to setting fires?

The law, though uncertainly laid down in the case at bar up to this point in this litigation, holds that such a contract is not contrary to public policy, and its tendency is not inimical to the public interest.

The Iowa Supreme court, composed of five judges, first held unanimously that such a contract was invalid. Under the combined influence of all the railroads passing through that state, a rehearing was procured, and three of the judges were induced to change, without any explanation, their former holding.

Griswold v. *I. C. R. R.*, 53 N. W. Rep., 295.
Griswold v. *I. C. R. R.*, 57 N. W. Rep., 843.

Judge SHIRAS in the case at bar, understanding that he was bound to follow the Iowa Supreme Court on this question whether in his opinion such court was right or wrong, first continued this cause on his own motion awaiting the final action of that court on a second petition for rehearing, and when the second petition was overruled, filed his opinion in this case, holding such a contract valid (not because such was his opinion of the law) but, because three of the Iowa judges, without explanation, reason or authority, had changed their former holding, and Judge Shiras considered himself, as a federal judge sitting in Iowa, technically bound by their decision even though as matter of fact it did not agree with his personal opinion of the law. Judge Caldwell in the Appellate court concurred in the conclusion there reached that such a contract

was valid, because, as he said, the Federal court sitting in Iowa was bound to follow the uncertain opinion of the three state judges. Judges Sanborn and Thayer disagreed with both him and Judge Shiras on this point, but held on principle that such a contract was valid. Thus we have two of the judges in the Iowa Supreme court, *upon authority*, in an able opinion holding such a contract invalid. It is fair, we think, to place Judge Shiras in company with these and possibly Judge Caldwell, making four of the able judges who have passed on the question in favor of the invalidity of the contract, and five, a bare majority of one, in favor of its validity.

The railway acquired its right of way under the law of eminent domain, for the purpose of constructing and operating a railroad. Whenever it attempted to devote the land thus acquired to other purposes for private gain this amounted to a sequestration and that moment it lost all right in the land and the lease failed for want of title. If this is not true it is because the railway, as a common carrier, had the right to devote the land so acquired to purposes incidental and necessary to the operation of the road. If this is true then it entered into the lease in its capacity as a common carrier and therein sought to protect itself against its own negligence as a common carrier, which, it is conceded, it could not do under all the authorities. By permitting others to come on its right of way and do for it those things which are necessary or incidental to its business as a common carrier it cannot thus relieve itself from the duty of care which would otherwise attach to it. It made this lease in order to increase its facilties as a common carrier and to promote its business as such, otherwise it had no right to make it. See quotation from Judge Robinson's opinion, former brief, page 7.

In the opinion of the Appellate court, it is said: "But the defendant in error and Simpson, McIntire & Co., did not

stand on unequal footing. The lessees were not compelled to lease of the railroad company. The latter had no monopoly of land in Iowa. Each party had the option to execute or to refuse to execute the lease. The condition exempting the company from liability for damages to the property of the lessees, caused by fire, set by the negligence of the company, relieved the company from no duty it was required by law to perform, but simply provided that it should not assume additional burden, which it had the option to take or to refuse." (Rec., 48.)

A railway company and a contractor to remove a hill from its right of way do not stand on unequal footing, and yet it was held in such a case under a contract presenting this same question (*Johnson* v. *Ry.*, 11 S. E. Rep., 829), that "To uphold the stipulation in question would be to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void. Nothing is better settled, certainly, in this court, than that a common carrier cannot, by contract, exempt himself from responsibility, for his own or his servants' negligence in the carriage of goods or passengers for hire. This is so, independently of Section 1296 of the Code, and the principle which invalidates a stipulation for exemption from liability for one's own negligence is not confined to the contracts of carriers as such. It applies universally. Cooley, Torts p. 687; 2 Thomp. Neg., 1025; *Roesner* v. *Hermann*, 10 Biss. 486; 8 Fed. Rep. 782; *Railway Co.* v. *Spangler*, 44 Ohio State, 471."

A private employer and his servant stand on equal footing to contract, and yet Judge GRESHAM held on a contract of this kind between them as stated in the syllabus (*Roesner* v. *Her-*

mann, 10 Biss. 486) that "A contract between an employer and employe, by which the employe, in consideration of his employment, releases and discharges his employer from all liability for damages for injury or death of the employe, resulting from the negligence of his employer, is void as against public policy."

The statement in the opinion of the Appellate court on which really the conclusion reached is dependent viz: that the lease "simply provided that it should not assume an additional burden which it had the option to take or refuse" (Record, 48), is not sound. It may be conceded for the argument only that the road had the right to make the lease or refuse to make it. But if it should make it, it cannot be well contended that it had the right to assume or refuse to assume the legal duty which necessarily went with the making of the lease. In fact it had no right to make the lease, but if it did make it, then the duty of ordinary care went along with the transactions under the lease. The law was a necessary party to or element in the contract, and this the parties could not eliminate.

On account of the great importance of the question, the uncertainty as to what the law is governing this question, the diversity of judicial opinion already expressed thereon in this case, and the vast amount indirectly involved, we earnestly request that the writ asked for be granted, to the end that an authoritative opinion may be had from this court, settling at once this question for all parts of our country.

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